STATE OF MICHIGAN

COURT OF APPEALS

RONALD CARNOSKES, JR.,

Plaintiff-Appellant,

v

AETNA INDUSTRIES, INC.,

Defendant-Appellee.

UNPUBLISHED
November 16, 2001

No. 228170
Worker's Compensation
Appellate Commission
LC No. 97-000741

Before: K.F. Kelly, P.J., and Hood and Zahra, JJ.

PER CURIAM.

This case is again before this Court pursuant to the Supreme Court's remand order for consideration as on leave granted in light of *Russell v Whirlpool Financial Corp*, 461 Mich 579; 608 NW2d 52 (2000). We reverse and reinstate the magistrate's decision.

I

Defendant hired plaintiff as a production welder immediately following his high school graduation in July of 1992. Although plaintiff suffered an injury to his left knee during high school that required surgery, the surgery was successful and there was no dispute that his knee was in excellent condition when he began working for defendant.

On April 13, 1993, plaintiff re-injured his left knee when he slipped and fell in a puddle of hydraulic fluid at work. Conservative treatment failed to resolve instability in the joint. Consequently, on June 15, 1994, plaintiff underwent reconstructive surgery on his knee to repair torn tendons. Plaintiff was voluntarily paid workers' compensation benefits from April 14, 1993 through February 13, 1995. He attempted to return to work in December 1994, but his knee swelled significantly, and he underwent six more weeks of physical therapy.

Plaintiff again attempted to return to work on February 14, 1995, but no sit-down work was available. He attempted to perform a stand-up job, but his knee began to swell again. He was sent home. The following day, plaintiff neither reported for work nor called in to advise of his absence. Plaintiff testified that on February 17, 1995, he went to the corporate health clinic, where his knee was treated with ultrasound and massage. He did not return to work, but went to see his own doctor on February 23, 1995. Apparently, plaintff did not call in or return to work until someone from work called him on March 5, 1995. At that time, plaintiff's employer told

him to come in because a sit-down job was available. Plaintiff, however, was instructed to go to the clinic and obtain a release before returning.

Plaintiff testified that he went to the clinic the next morning, March 6, 1995, between eight and nine in the morning and did not get out until after one o'clock in the afternoon. He called into work, but claimed that the plant manager told him not to come in until the next day. Plaintiff reported for work on March 7, 1995, and was given a desk job. That same day, plaintiff was presented with a warning letter for three unexcused absences on February 15, 16 and 17, 1995. Plaintiff had previously received two written warnings for unexcused absences in December 1992 and January and March 1993. Plaintiff continued to work at the desk job, but received a second written warning on May 5, 1995 for unexcused absences on March 6, April 12 and April 24, 1995. At a counseling session during which he was given the letter, plaintiff claimed that these absences were due to problems with his knee. Finally, on September 8, 1995, plaintiff was given a discharge notice after unexcused absences on June 21, August 14, August 23 and August 25, 1995.

Plaintiff filed an application for hearing with the workers' compensation bureau on October 26, 1995. Magistrate Richard J. Zettel found that plaintiff proved a partial disability by a preponderance of the evidence. He acknowledged recent decisions holding that an employee working under restrictions may be terminated for just cause and lose his entitlement to benefits if his intentional actions are the type that a reasonable employee would realize will result in the loss of his employment. However, the magistrate determined that defendant did not have just cause to terminate plaintiff because on February 15-17, 1995, "[p]laintiff was still suffering residuals from his left knee injury on those dates and was unable to work because of those residuals." The magistrate further found that defendant was not justified in charging plaintiff with an unexcused absence on March 6, 1995, because the plant manager told him not to come in until the next day. Based on his finding that defendant fired plaintiff without just cause, the magistrate awarded plaintiff continuing benefits along with reasonable medical, surgical and hospital expenses.

The WCAC reversed finding that the magistrate committed legal error by inquiring into the reasons for plaintiff's absences rather than addressing whether those absences violated the terms of the collective bargaining agreement.[1] Relying on this Court's decisions in *Dimcevski v*

[1] The commission stated in relevant part:

Based on the found facts and a review of the entire record, we find the dismissal was for bona fide reasons. The record is clear that plaintiff violated the terms of the collective bargaining agreement by accumulating sufficient **unexcused** absences within the applicable time period. We find defendant fired plaintiff for reasons unrelated to his disability. The record is clear that defendant dismissed plaintiff for unexcused habitual absenteeism. This was undisputed. We further find that plaintiff was fully aware of the collective bargaining agreement regarding absences. There appears to be nothing unclear about the policy in question. Plaintiff was fired for violation of that policy which would normally result in termination of a nondisabled employee. The violation was not caused by plaintiff's disability but, rather by plaintiff's repeated failure to secure a doctor's note or a note from a company nurse for each of the ten absences at issue. Therefore, we find plaintiff's conduct of excessive unexcused absenteeism constituted a

(continued…)

Utica Packing Co (On Remand), 215 Mich App 332; 544 NW2d 763 (1996), and *Brown v Contech Division of Sealed Power Technologies*, 211 Mich App 256; 535 NW2d 195 (1995), the commission concluded that plaintiff had forfeited his entitlement to benefits by his violation of the absence policy and terminated benefits as of plaintiff's date of discharge.

Plaintiff sought leave to appeal to this Court, which denied leave to appeal on the basis of the holdings of *Brown*, *Dimcevski*, and *Lee v Koegel Meats*, 199 Mich App 696; 502 NW2d 711 (1993), which were binding precedent pursuant to MCR 7.215(H). However, on March 29, 2000, the Supreme Court issued its opinion in *Russell v Whirlpool Financial Corp*, 461 Mich 579; 609 NW2d 177 (2000) which specifically overruled the decisions rendered in *Brown* and *Lee*, and held that "the plain language of subsection 301(5)(e) (MCL 418.301(5)(e)) makes it clear that an employee, who has established benefit entitlement pursuant to the terms of subsection 301(5), has a right to benefit continuation even if the employee is terminated for just cause." *Id*. at 586. Plaintiff argues that the Supreme Court's decision in *Russell*, *supra*, requires that this Court vacate the WCAC's opinion and reinstate the magistrate's decision. We agree.

II

Defendant asserts that the commission correctly found that plaintiff's absenteeism constituted a refusal of reasonable employment, and his benefits should be terminated until he ends his refusal in good faith. We disagree. This court reviews de novo questions of law contained in any final order issued by the WCAC. *DiBenedetto v West Shore Hospital*, 461 Mich 394, 401; 605 NW2d 300 (2000).

The factual scenario presented in *Russell*, is substantially similar to the facts presented in the case at bar and thus compels the conclusion that the WCAC erred as a matter of law by reversing the magistrate's open award of benefits. The Supreme Court held that plaintiff was entitled to benefits because termination for "just cause" constitutes losing one's job "for whatever reason" as set forth in MCL 418.301(5)(e). Thus, the reasons for the claimant's discharge are irrelevant to his eligibility for benefits. *Id*., 587-588. Instead, the pertinent inquiry is whether the employee unreasonably refused reasonable employment, as dictated by MCL 418.301(5)(a).

In this case, the WCAC agreed with defendant's argument that "plaintiff's conduct of excessive unexcused absenteeism constituted a refusal to perform the employment." However, plaintiff did not refuse to perform the employment; on the contrary, he continued to report for work until he was terminated, and in fact filed a grievance regarding his termination. This is consistent with the facts in *Russell*, where the plaintiff indicated her willingness to return to work despite her unexcused absences. There is simply no evidence to support a finding that plaintiff refused to perform the work. Compare *Dimcevski*, *supra*, at 333-334. Because the commission reversed the magistrate's decision relying solely on cases that have been reversed by *Russell*, *supra*, the decision cannot stand.

(…continued)

refusal to perform the employment.

III

The commission declined to address defendant's second issue, which claimed that the magistrate erred by failing to consider whether plaintiff's restrictions precluded him from performing his regular work. Thus, defendant alternatively contends that this Court should remand the matter to the commission for a determination of whether plaintiff is disabled and whether his discharge was causally related to his injury. We find this argument to be without merit in light of the magistrate's finding that plaintiff is partially disabled and entitled to wage loss benefits. If plaintiff were capable of performing his regular work, he would not have been found to be compensably disabled at all, since he would have suffered no loss of wage-earning capacity. See *Haske v Transport Leasing, Inc*, *Indiana*, 455 Mich 628; 566 NW2d 896 (1997). Thus, remand is not necessary.

The commission's decision is reversed. The magistrate's decision and award of benefits is reinstated. We do not retain jurisdiction.

/s/ Kirsten Frank Kelly
/s/ Harold Hood

Zahra, J. concurring in result only.